

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

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**COMMENTS OF
EXCEL TELECOMMUNICATIONS, INC.**

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SUMMARY

- In its Recommended Decision, the Joint Board rejected arguments that so-called “pure” resellers of local exchange service should be eligible for universal service subsidies on the basis that eligible carriers must use their *own facilities* in combination with the resold services of other carriers. In doing so, the Joint Board violated a fundamental principle of the 1996 Act – competitive neutrality. The statute does not “plainly” require the Joint Board’s interpretation and the Commission should carefully reconsider the consequences of an interpretation that excludes an entire class of carriers from becoming eligible for universal service support. However, if the Commission decides that the Joint Board’s interpretation is correct, it should forbear from enforcing the facilities restriction.
- The Commission must adopt a workable test for the states to apply when making Section 214(e) eligibility determinations. Excel urges the Commission to (1) provide guidance to the states regarding what constitutes “facilities” for the purpose of determining eligibility under Section 214(e) and (2) prohibit states from using alternative definitions or classifications.
- If local resale carriers are not eligible to receive universal service support directly, the Commission must require facilities-based carriers to pass through universal service subsidies to the local resale carrier that actually provides service to eligible customers, or, at the very least, allow local resale carriers to receive credits, equal to the subsidy they would have received, to reduce their otherwise applicable universal service fund assessment.
- The Commission should adopt a rule that prohibits facilities-based carriers from recouping universal service fund contributions, either explicitly or implicitly, by increasing the prices charged to local resellers. Recouping universal service fund assessments by increasing the price of services sold to resellers violates the equitable and nondiscriminatory assessment standard of Section 254(b)(4) and must be expressly prohibited.

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**COMMENTS OF
EXCEL TELECOMMUNICATIONS, INC.**

Excel Telecommunications, Inc. ("Excel"), by its undersigned counsel and pursuant to Public Notice, DA 96-1891 (released November 18, 1996), submits these Comments on the Recommended Decision of the Joint Board issued in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

Excel was formed in 1988 and has been a provider of interexchange long distance services since 1989. Excel is currently authorized to provide resold long distance telecommunications services in every state except Hawaii, either pursuant to certification, registration, or (where appropriate) state deregulation policies, and is in the process of filing for state authority to provide resold local exchange service throughout the Nation.

¹*In the Matter of Federal-State Joint Board on Universal Service*, Recommended Decision of the Joint Board, CC Docket No. 96-45 (rel. Nov. 8, 1996) ("Recommended Decision").

Excel currently provides service on a switchless resale basis, but plans to begin installing switching centers in the near future. The company expects that the switches will be used to provide Excel's long distance and local services.

Excel markets its long distance service primarily to residential customers. Ninety-eight percent (98%) of Excel's customers are residential subscribers, making Excel the fourth largest provider of long distance services to residential subscribers, after AT&T, MCI, and Sprint. Excel offers high quality, cost effective long distance telecommunications accompanied by superior customer service. The quality and value of Excel's service is evidenced by the rapid growth of its customer base over the past several years (more than 200% for 1994 and 1995). Excel is now seeking to leverage its skills in providing superior long distance telecommunications services to the local exchange market.

Excel has taken, and will continue to take, the position that all customers should be served equally. As an interexchange carrier and a new entrant in the local exchange market that is dedicated to serving both residential and rural customers, Excel has a unique interest in ensuring that universal service subsidies are distributed, and universal service fund contributions are made, on a competitively neutral basis.

In its Recommended Decision, the Joint Board rejected arguments that so-called "pure" resellers of local exchange service should be eligible for universal service subsidies, on the basis that eligible carriers must use their *own facilities* in combination with the resold

services of other carriers.² In doing so, the Joint Board violated a fundamental principle of the 1996 Act³ – competitive neutrality. The statute does not “plainly” require the Joint Board’s interpretation and the Commission should carefully reconsider the consequences of an interpretation that excludes an entire class of carriers (local exchange resellers) from becoming eligible for universal service support.

Even if the Commission agrees with the Joint Board’s interpretation of the statute, and determines that as a matter of legal interpretation carriers providing resold local services are not eligible for universal service subsidies because they are not providing the services using their *own facilities* (in combination with the resold services of other carriers), public policy dictates that the Commission should forbear from applying the facilities-based restriction. Alternatively it should adopt a rule that facilities-based local exchange carriers must pass through universal service subsidies to local exchange resellers serving eligible customers. The 1996 Act plainly contemplates an evolving competitive market made up of many different players. In order for local resellers to be a participant in the evolving competitive market, they must not be precluded from receiving universal service support that other local exchange carriers will have the opportunity to receive.

Finally, in addition to adopting rules clarifying that local resellers are entitled to receive universal service support, the Commission should adopt a rule that explicitly

²Recommended Decision at ¶ 161.

³Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

prohibits facilities-based carriers from recouping universal service fund contributions, either explicitly or implicitly, by increasing the prices charged to local resellers. Recouping universal service fund assessments by increasing the price of services sold to resellers violates the equitable and nondiscriminatory assessment standard of Section 254(b)(4) and must be expressly prohibited.

I. IF UNIVERSAL SERVICE IS TO BE TRULY COMPETITIVELY NEUTRAL, LOCAL RESELLERS MUST BE ALLOWED TO RECEIVE UNIVERSAL SERVICE SUPPORT

A. The Joint Board's Interpretation of "Eligible Carrier" Violates the Principle of Competitive Neutrality

In an initial paragraph of its Recommended Decision, the Joint Board recommended that the Commission be guided by the fundamental principle of "competitive neutrality" when establishing policies for the preservation of universal service. The Joint Board states:

[w]e further believe that the principle of competitive neutrality should be applied to each and every recipient and contributor to the universal service support mechanisms, regardless of size, status or geographic location. We find that the *competitively neutral collection and distribution of funds and determination of eligibility* in the universal service support mechanism is consistent with congressional intent "to provide for a pro-competitive, deregulatory national policy framework."⁴

⁴Recommended Decision at ¶ 23 (emphasis added).

Given this finding, it is ironic that the Joint Board proceeds to violate its own principle by proposing to deny local resellers the opportunity to receive universal service funding.⁵ Excel respectfully submits that any rule excluding local resellers from fully participating in the new universal service fund is not only a barrier to competition, it is also harmful to consumers.

Local resellers must not be forced to contribute to a universal service fund and, at the same time, be precluded from recovering the additional costs they actually incur by serving low income customers and customers in high cost areas. Denying recovery of such costs incurred by local resellers reduces the margin that allows resellers to exist. Because local resellers must necessarily compete with facilities-based carriers for customers, if local resellers do not receive universal service support and facilities-based carriers do, the flow of universal service support effectively erects a barrier to entry in the market for the provision of universal service.

Denying local resellers the opportunity to receive universal service support will also reduce customers' choices and delay the benefits of competition to the very customers that universal service is targeted to benefit. If local resellers do not receive universal service support to help them recover the higher costs incurred in providing universal services, they will be forced to absorb their losses, increase prices charged to consumers, or stop providing universal service to low income customers and customers in high cost areas

⁵The Joint Board's finding is discussed in detail in Section B, *infra*.

altogether. Denying resellers the opportunity to compete in the market for the provision of universal services flies in the face of the Commission's long-standing recognition of the benefits that resale provides, the specific endorsement of resale as a viable and important method of market entry in the Commission's Interconnection Order, and all local exchange carriers' fundamental obligation under Section 251 (b) not to prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of telecommunications services.⁶

⁶The Commission has repeatedly acknowledged the numerous public benefits resale generates, including the downward pressure resale exerts on rates and enhancements in the diversity and quality of product and service offerings that resale produces. The FCC also recently recognized the importance of resale as a market entry strategy under the 1996 Act:

Resale will be an important entry strategy both in the short term for many new entrants *as they build out their own facilities* and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks.

In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, FCC 96-325, ¶ 23 (rel. Aug. 8, 1996) ("Interconnection Order") (emphasis added). The 1996 Act clearly contemplates "three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale," and neither explicitly nor implicitly expresses a preference for one particular entry strategy. *Id.* at ¶ 12. As in the Interconnection Rulemaking, the FCC's obligation in this proceeding is to "establish rules that will ensure that all pro-competitive entry strategies may be explored" and to "look to the market, not to regulation" to determine success or failure. *Id.*

B. In Recommending that Local Resellers Not Be Eligible to Receive Universal Service Support, the Joint Board Interpreted Section 214(e) Incorrectly

The Joint Board rejected the arguments of TRA that a carrier offering universal service solely through reselling another carrier's universal service package should be eligible for universal service support. Section 254(e) states that "only an eligible telecommunications carrier designated under § 214(e) shall be eligible to receive specific Federal universal service support." Section 214(e), in turn, requires a carrier to do the following to qualify as an "eligible carrier": (1) offer the services that are supported by the federal universal support mechanism; (2) offer such services using its own facilities or a combination of its own facilities and resale of another carrier's service, and; (3) advertise the availability of and charges for such services using media of general distribution. TRA argued that while Section 214(e) could be read to require the provision by a carrier of some physical facilities, a reseller of local exchange service that pieces together a "virtual network" out of unbundled network elements acquired from the LEC pursuant to Section 251(c)(3) has constructed a network no less viable than the LEC's physical network.⁷ TRA essentially asked the Joint Board to accept this "virtual network" concept as meeting the requirement of Section 214(e) that eligible carriers provide service using their *own facilities* in combination with the resold services of another carrier.

⁷TRA Comments at 9.

The Joint Board found that "the statute precludes such a result because it plainly states that a carrier shall be eligible for support only if the carrier offers universal service by using its own facilities and reselling another carrier's services."⁸ The Joint Board based its decision on the "statutory criteria" which define eligible carriers:

Section 214(e) requires that, in order to be eligible for universal service support, a common carrier must offer universal service throughout the state-designated service area either using its own facilities or a combination of its own facilities and the resale of another carrier's services, including those of another eligible carrier. We find that the plain meaning of this provision is that a carrier would be eligible for universal service support if it offers all of the specified services throughout the service area using its own facilities or using its own facilities in combination with the resale of the specified services purchased from another carrier, including the incumbent LEC or any other carrier.⁹

Excel respectfully suggests that the Joint Board's finding quoted above is deficient in two respects. First, it assumes a common understanding of the term "facilities" and it provides no guidance on the threshold test of what facilities a carrier must provide to meet this eligibility requirement. Second, it seems to imply that the carrier must use its own facilities to provide at least a portion of *each one* of the specified services.

To Excel's knowledge, there is no accepted understanding of the term "facilities." While those in the telecommunications industry commonly refer to carriers as either resellers or facilities-based carriers, the terms have never been explicitly or implicitly defined. Excel notes that in the Notice of Proposed Rulemaking on Implementation of the

⁸Recommended Decision at ¶ 161.

⁹Recommended Decision at ¶ 160 (footnotes omitted).

Infrastructure Sharing Provisions of the 1996 Act, the Commission explicitly requested comment on whether and how it should define the phrase "telecommunications facilities".¹⁰ Excel respectfully suggests that the term "facilities" is much broader than the phrase "telecommunications facilities" and that "facilities" needs to be defined for purposes of Section 214(e). For example, if Excel provides local exchange service using its own switches to provide exchange access or for billing purposes, does Excel meet the facilities test of Section 214(e)? If Excel lays one mile of fiber within its service area to provide local exchange service or exchange access, does Excel meet the facilities test of Section 214(e)? If Excel purchases unbundled network elements and combines those elements to provide local exchange service, does Excel meet the facilities test of Section 214(e)? If Excel establishes a billing office where customers may pay their bills, does Excel meet the facilities test of Section 214(e)? The Commission should define the term "facilities" broadly to avoid the necessity of litigating questions such as these before 50 different state regulatory bodies.¹¹

¹⁰*In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket No. 96-237, ¶ 9 (rel. Nov. 22, 1996).

¹¹Moreover, larger resale carriers with significant economic resources would be able to game any definition of "facilities" to the detriment of more recent market entrants. For example, should it decide to do so, AT&T would be able to construct just enough "facilities" to qualify for funding eligibility, even if its plans were to provide local service utilizing primarily resold services.

It could be argued that by using the phrase "all of the specified services," the Joint Board would require a carrier to use its own facilities to provide some portion of (1) voice grade access to the public switched network with the ability to place and receive calls; (2) touch-tone or dual multifrequency signaling; (3) access to operator services; (4) access to interexchange services; *AND* (5) access to directory assistance. This is in direct contradiction to the plain terms of the statute. Carriers should qualify as "eligible carriers" (carriers eligible to receive universal service funding) if they use their own facilities to provide *any* aspect of any *one* service. In other words, a carrier can be eligible by using a combination of its own switching facilities and the resale of another carrier's services to provide exchange access, and providing the remaining services strictly through the resale of another carrier's services.

Even if the Commission affirms the Joint Board's finding, it is imperative that the Commission set forth a workable test that the states may apply when making Section 214(e) eligibility determinations. Excel urges the Commission to (1) provide guidance to the states regarding what constitutes "facilities" for the purpose of determining eligibility under Section 214(e) and (2) prohibit states from using alternative definitions or classifications. Because of the potential for wide variation in states' definitions and classifications of facilities-based versus resale carriers, any eligibility test based on a state's definition or classification would inevitably lead to inconsistent results, and would require carriers to litigate the issues in 50 different jurisdictions. The Commission must

prohibit such balkanization by requiring states to apply uniform federal guidelines in determining what facilities a carrier must provide in order to be designated as an eligible carrier under Section 214(e).

C. If the Commission Adopts the Joint Board's Interpretation of "Eligible Carrier," It Should Forbear from Applying the Facilities Restriction

Parties in this proceeding asked the Joint Board to forbear from applying the facilities restriction and argued that by stepping into the shoes of the incumbent local exchange carrier ("ILEC"), a reseller not only provides its customers with the same basic universal service the ILEC would have provided, but also provides the ILEC a guaranteed return on its investment in the facilities used to provide the resold services. The Joint Board rejected the request that the Commission exercise its forbearance authority to permit "pure" resellers to become eligible for universal service support because it found that the parties had not met the statutory criteria for forbearance.¹² The statutory criteria require a determination by the Commission that:

(1) enforcement of the provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such provision is not necessary for the protection of consumers; and

¹²Recommended Decision at ¶ 162.

(3) forbearance from applying such provision is consistent with the public interest.¹³

First, it seems self-evident that the facilities restriction in Section 214(e) is not necessary to ensure just and reasonable charges, practices, classifications, etc. of a reseller. Furthermore, as demonstrated above, the facilities restriction is itself unreasonably discriminatory because it disadvantages an entire class of carriers.

Second, enforcement of the facilities restriction is not necessary for the protection of consumers. So long as consumers receive the universal services for which they are eligible, it should make no difference whether those services are provided by a carrier using some of its own facilities or by a carrier reselling the services of another carrier. Enforcing the facilities restriction may actually harm consumers by limiting their choice of universal service providers and delaying competition in the market for universal services.

Third, in its Interconnection Order, the Commission explicitly rejected the argument that requiring carriers to own some local exchange facilities would promote competition in the local exchange market.¹⁴ The Commission also explicitly rejected arguments that such a requirement should be adopted for *other policy reasons*.¹⁵ Allowing resellers to receive universal service support will enhance competition in high cost areas and in the provision of telecommunications services to qualifying low income consumers. As TRA argued in

¹³See, 47 U.S.C. § 160(a).

¹⁴Interconnection Order at ¶ 340.

¹⁵Interconnection Order at ¶ 340.

its Comments, the Commission has already recognized the lower prices and service enhancements that resale provides.¹⁶ Thus, to the extent that the Commission determines that the Section 214(e) requirement that carriers rely upon their own facilities in whole or in part before being eligible for universal service subsidies is not met when a carrier resells the local services of another carrier, the Commission should forbear from applying the facilities restriction in order to promote competition in the provision of universal service in accordance with 47 U.S.C. §160(a). Competition in the market for the provision of universal service will both drive prices down and provide incentives for carriers to become more efficient, making access to the telecommunications network more affordable for all consumers.

For the foregoing reasons, Excel urges the Commission to reconsider the Joint Board's recommendation and to forbear from applying the facilities restriction in Section 214(e).

D. If the Commission Retains a Facilities Restriction, Eligible Facilities-Based Carriers Should be Required to Pass Through Subsidies to Local Resellers

It is unclear whether the underlying facilities-based carrier is eligible for the subsidy when another carrier resells the underlying carrier's service to eligible customers. Although the Joint Board summarized the arguments of parties regarding which carrier, the facilities-

¹⁶See, note 6, *supra*.

based carrier or the reselling or interconnecting carrier, receives the subsidy,¹⁷ it did not make any specific recommendation. Excel urges the Commission to address this issue. If the reseller is not directly eligible for universal service subsidies, the facilities-based carrier should be eligible for such subsidies because it is providing universal service to a customer (the reseller) who in turn is providing universal service to eligible low income and high cost area customers.

As noted in the introduction, Excel is committed to serving all customers that request service in Excel's service area and as such, Excel's customer base is primarily residential (98%). Excel also serves a large number of rural customers throughout the United States. Nonetheless Excel offers a blended (deaveraged) rate to all of its customers, despite the fact that Excel incurs additional costs to serve those customers in high cost or rural areas. This is because Excel's facilities-based carriers pass through the higher costs of serving rural and high cost areas to Excel in the form of either cost-plus charges or high cost surcharges. In providing resold local services, by buying and reselling the underlying LEC's universal services, Excel will step into the shoes of the LEC and assume the risks associated with providing the services supported by the federal universal service mechanism, while guaranteeing the LEC a return on its investment in those facilities. The Commission should not allow the underlying LEC to over-recover its costs by charging local resellers its normal charges, while at the same time, recovering costs from universal

¹⁷Recommended Decision at ¶ 153.

service support mechanisms. If the facilities-based LEC is able to subsidize its costs of providing universal service to Excel, that subsidy must be reflected in the amount Excel is charged to purchase the service and resell it to an eligible low income or high cost area customer.

E. If the Underlying Facilities-Based Provider Does Not Pass Through Universal Service Subsidies, Local Resellers Should Receive Credits for Providing Universal Service

If the Commission declines to adopt a rule permitting local exchange resellers to be designated "eligible carriers" and declines to adopt a rule requiring facilities-based carriers to pass through subsidies to resellers, then resellers providing universal service should receive credits that reduce their otherwise applicable universal service contribution. If a reseller is willing and able to provide universal service to a customer without receiving the benefit of universal service support to offset its costs, that carrier should, at the very least, be allowed to offset its universal service fund assessment by the amount of support the carrier would have received had it been eligible. To require otherwise would be a disincentive for resellers to provide service to customers who are universal service eligible and would also be inconsistent with the fundamental funding mechanism mandated by Section 254(b)(4). In the absence of universal service support or the pass-through of universal service subsidies, providing credits to local resellers is the only way to ensure that the federal universal service mechanism is competitively neutral.

II. THE COMMISSION SHOULD ADOPT A RULE THAT PROHIBITS FACILITIES-BASED CARRIERS FROM RECOVERING THEIR UNIVERSAL SERVICE FUND ASSESSMENT, EITHER EXPLICITLY OR IMPLICITLY, BY INCREASING THEIR WHOLESALE RATES CHARGED TO LOCAL RESELLERS

In its Interconnection Order, the Commission concluded that funding for any universal service mechanism may not be included in the rates for interconnection, network elements, and access to network elements.¹⁸ Excel urges the Commission to reiterate that finding here and clarify that the same restriction applies to wholesale rates offered by incumbent local exchange carriers to local resellers.

As the Commission recognized in its Interconnection Order, including universal service charges in the rates for elements and services offered pursuant to Sections 251 and 252 is

inconsistent with the requirement of section 254(f) that telecommunications carriers contribute to state universal service on a nondiscriminatory basis, because telecommunications carriers requesting interconnection or access to unbundled network elements will be required to make contributions to universal service support through such surcharges. States may not, therefore, include universal service support funding in the rates for elements and services pursuant to sections 251 and 252, nor may they implement mechanisms that have the same effect.¹⁹

Although the Commission was referring to rates for unbundled network elements in its discussion, the arguments are similarly applicable to wholesale rates for resold services, which are also required pursuant to Section 251. The Commission should explicitly

¹⁸Interconnection Order at ¶ 712.

¹⁹*Id.* at ¶ 713.

reiterate this prohibition in the context of this docket. Section 254 requires that contributions to both state (Section 254(f)) and federal (Section 254(d)) universal service funds be assessed in an equitable and nondiscriminatory manner. Facilities-based carriers must not be allowed to pass through their universal service assessments, either explicitly or implicitly, to local resellers. As the Commission recognized, such a pass-through system constitutes an universal service assessment that violates the equitable and nondiscriminatory contribution requirement.

CONCLUSION

The Commission should adhere to the Joint Board's principle of competitive neutrality in designing the new universal service fund, and require competitive neutrality in assessing universal service fund contributions and in distributing universal service support. The Commission must not exclude an entire class of carriers (local exchange resellers) from receiving universal service support. Excluding resellers from the class of eligible carriers will discourage competition and defer the concomitant benefits of lower prices and service innovation. Including resellers in the class of eligible carriers will have the opposite effect, promoting competition in the provision of universal service that will benefit most the very individuals that the program is intended to assist.

If the Commission decides to adopt the Joint Board's recommendation and exclude local exchange resellers from the class of eligible carriers, the Commission must adopt a

workable test to determine what "facilities" a carrier must use in providing the services that make up universal service. The Commission must also require facilities-based carriers to pass through universal service subsidies to the local resale carrier that actually provides service to eligible customers, or, at the very least, allow local resale carriers to receive credits, equal to the subsidy they would have received, to reduce their universal service fund assessment.

Respectfully submitted,



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